United States Court of Appeals

for the Second Circuit

REPLY BRIEF

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. [illegible]

ROY [illegible],

Petitioner,

—v.—

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

PETITION FOR REVIEW OF AN ORDER OF THE BOARD OF IMMIGRATION APPEALS

PETITIONER'S REPLY

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B
P/S

UNITED STATES COURT OF APPEALS
FILED
DEC [illegible] 1976
SECOND CIRCUIT

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TABLE OF CASES

This brief is submitted in reply to Respondent's brief.

I

After petitioner's brief was filed, the Fourth Circuit decision in the case of Yee Dai Shek v. Immigration & Naturalization Service, 541 F.2d 1067(4th Cir.1976) was printed in the Federal Reporter of November 22,1976. Consequently, this case was not cited. The facts and issues raised in this case are analagous if not identical to the matter at hand.

The facts in the cited case indicate that the alien entered the United States as a deserting crewman. In order to escape detection he made a false claim to U.S. citizenship. Although working, he never filed income tax returns and illegally claimed three dependents on his withholding forms. At a deportation hearing the immigration judge denied his application to be permitted to depart the country voluntarily and ordered him deported stating at 1068:

> "In view of the fact that the respondent deliberately attempted to deceive officers of the Immigration Service, has failed to file income tax returns... and having no immediate ties in the United States, nor anyone dependent upon him for support, I find no reason to grant him voluntary departure..." [emphasis supplied]

One month thereafter, the alien married a permanent resident of the United States and thereupon moved the Board of Immigration Appeals to reopen deportation proceedings. The Board

denied the motion as stated in 1068:

> "In support of the motion to reopen, counsel advises that the respondent is now married to a permanent resident alien and his spouse has filed a visa petition in his behalf. No statement has been made that such visa petition has been approved. We conclude that no additional facts have been provided to meet the requirements for reopening..." [emphasis supplied]

Subsequently, the alien filed another motion to reopen based on the fact that his wife was now a citizen of the United States and that he was the father of a United States citizen child born of this marriage. The Board's denial of the motion as set forth at 1069:

> "On October 10,1974, we dismissed the respondent's appeal from an order of an immigrant judge dated January 8, 1974, finding the respondent deportable as charged and denying his application for voluntary departure. At the same time we denied the respondent's motion to reopen the proceedings to permit the respondent to apply anew for the privilege of voluntary departure. The Service is opposed to the grant of the motion."

On appeal, the Fourth Circuit reversed the Board and granted the petition, remanding the matter to give petitioner an opportunity to reapply for voluntary departure. Since the language of the Court is so pertinent and similar to that contained in petitioner's brief the Court's reasoning is quoted at length from 1069.

"The Board of Immigration Appeals has discretion to either grant or deny a motion to reopen a deportation proceeding. La Franca v. Immigration and Naturalization Service, 431 F.2d 686, 690(2d Cir.1969). Our review of the Board's action is limited to determining whether there has been any abuse of its discretion. Foti v. Immigration and Naturalization Service, 375 U.S. 217,228, 84 S.Ct.306, 11 L.Ed.2d 281 (1962). The Board, like any other administrative agency, must act in accordance with its own regulations, and failure to do so is an abuse of discretion. The Immigration and Naturalization Service regulations pertaining to reopening of a Board decision provided in part:

"Motion to reopen in deportation proceedings shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing..." 8 C.F.R. §3.2.

Therefore, in reviewing the Board's decision we must examine Shek's proffered evidence to determine whether it is both new and significant. See Acevedo v. Immigration and Naturalization Service, 538 F.2d 918, No.75-4246(2d Cir.1976); La Franca v. Immigration and Naturalization Service, 413 F.2d 686,690(2d Cir.1969).

It is undisputed that the evidence of Shek's marriage and the birth of his child could not have been presented to the immigration judge, since these events occurred after the deportation hearing. By the Board's own standards, this evidence is significant. In deciding whether to grant voluntary departure, the Board has previously considered such factors as marriage to a citizen and the birth of a child who

> is a citizen occurring after the beginning of deportation proceedings. See Matter of T, 5 I.& N. Dec.736 (1954). This is entirely consistent with Congressional concern over "keeping families of United States citizens and immigrants united." See Immigration and Naturalization Service v. Errico, 385 U.S.214,220 n.9,87 S.Ct. 473, 17 L.Ed.2d 318 (1966).
>
> The Board's opinion declining to reopen does not mention the birth of the child, and it leaves unclear whether the Board recognized the validity of Shek's marriage or assumed that his cliam was specious. Since the new evidence, if true, would be significant, we conclude, in agreement with the dissenting member of the Board, that the proceedings should be reopened so that Shek's present situation can be fully evaluated. [emphasis supplied]
>
> Accordingly, the petition for review is granted and the case is remanded to the Board of Immigration Appeals for further proceedings."

The tortous attempt of the Service to distinguish Yee from the case at bar is noteworthy if only for its avoidance of the law of the case. The Service grasps at a footnote in the decision advising that the visa petition filed by the wife was approved during the pendancy of the appeal. However, it is apparent that this information played no part in the Court's decision since its review was limited to the record of proceedings before it and the Service's suggestion that the

tail should wag the dog indicates a bankrupt legal argument.

Another vain attempt by the Service to distinguish the cases is the assertion that petitioner not only seeks to avoid deportation in this appeal (as if this is not reason enough) but to rely upon a favorable decision by this Court along with an approved visa petition to return to the United States to reside with his United States citizen spouse and citizen child. Would the Service find the petitioner's position more tenable if he were to abandon them?

In this regard, the Service in a footnote advises that under the recently amended immigration law, aliens born in the Western Hemisphere will now be eligible to become residents in the United States under Section 245 of the Act, 8 U.S.C. 1255. The amendatory provisions, as well as the prior law, prohibits adjustment to those aliens who entered without inspection. Since petitioner entered in this manner, the relevancy of this footnote is only known to the Service.

II

The Service's contention that Matter of T, 5 I.& N. Dec.736, is not applicable to the instant case is besides the mark because in that case the immigration judge at a deportation hearing had the parties before him and was able to judge the bona-fides of their mutual relationship. He felt constrained to

order the alien deported because of prior Service policy. This appeal seeks the same relief - to remand the matter to the immigration judge to decide the validity of the family relationships.

III

The major thrust of the Service's argument is that without an approved visa petition the petitioner had no right to a reopening of deportation proceedings.

Its contention that "... the bona fides nature of this second 'marriage' is crucial for without an approved visa petition establishing its validity, Hibbert has no close family ties which warrant the reopening of his deportation hearing," is poor sophistry at best. The citizen wife and child may disappear at the behest of the Service and may reappear to damn him - note the implied motive for this appeal.

In a footnote, the Service reasserts this argument by alleging that a remand would accomplish nothing since the immigration judge and trial attorney would require the same careful investigation into the bona fides of petitioner's marriage that the District Director is currently conducting. The fallacy of this reasoning is that the immigration judge is not bound by the decision of the District Director and must make his own findings of fact. Consequently, even if, the District

Director approves the petition, the immigration judge can arrive at a contrary conclusion. Similarly, if the District Director denies the visa petition, the petitioner has a right of appeal to the Board of Immigration Appeals. Consequently, it is apparent that the Service's position cannot be supported in law or in fact.

The Service suggests in its footnote that petitioner, instead of filing multiple motions and petitions for review should bring an action for mandamus to compel the Service to adjudicate his wife's petition if he feels that administrative action is being arbitrarily withheld. If petitioner pursued this course, the Service would then allege another "dilatory" action by petitioner, since any action instituted by petitioner is so characterized. Furthermore, the gratuitous legal advice by the Service that petitioner should file an application for permission to reenter after deportation, Section 212(a)(17) of the Act, 8 U.S.C. §1182(a)(17) is oblivious to the facts of the case. As pointed out in petitioner's brief (page 5 footnote 2) this application was filed on June 18,1975. On January 28, 1976, in response to a status inquiry the defendant advised the petitioner that "inasmuch as there is no final order in this matter, and it is before the United States Court of Appeals for the Second Circuit your client's application; via Form I-212, cannot be adjudicated at this time, and it is returned herewith."

On April 23,1976, the application was returned to respondent advising that the Court action had been dismissed. The defendant has still not rendered a decision on this application. In the same light, the citizen wife's visa petition was filed on April 1,1976, and no decision has been forthcoming on this petition. To require nine months to investigate the petition, speaks for itself.

IV

The respondent's characterization of petitioner's legal remedies as "dilatory" suggests an overcompensating defensiveness when viewed in light of the Service's administrative inertia. Were it not for defendant's delay, studied inaction, and failure to act, this appeal would be unnecessary.

The importance attached to the approval of the wife's visa petition is misplaced for another reason. As indicated in petitioner's brief, the petitioner has an application for permanent residence pending at the American Consulate at Toronto, Canada. This application was made prior to the wife becoming a United States citizen. No petition was required to be filed, but only verification of the spouse's residence with the United States Consul who has sole authority over the issuance of a visa. Because of the State Department's regulations the wife was required to file a visa petition upon her naturalization. The

theory behind this regulation is that if the petition is approved, the petitioner would be classified as an "immediate relative" and be exempt from quota restrictions. Consequently, a visa number would be available for another applicant. (It should also be noted that upon the birth of his citizen child, petitioner qualified for permanent residence on this basis. An application is made soley by the submission of the birth certificate of the child and the marriage certificate). Although, it is conceded that by the filing of a visa petition the petitioner's waiting time for a visa would be materially reduced, the advantage here is more illusory than real since the advantage is predicated on an expeditious approval of the visa petition. As a matter of fact, petitioner's name has now been reached on the waiting list. Consequently, we have the illogical situation that if petitioner's wife was still a resident of the United States and not a citizen he would be in a better position.

Furthermore, the Board's policy in the Matter of T, supra applied to aliens married to permanent residents and not only citizens:

> "Even though marriages occur after the institution of deportation proceedings, in the absence of some unusual factors we have felt that departure without an order of deportation should be authorized because of consideration due to the wife, a citizen or lawful permanent resident. [emphasis supplied]

Consequently, if the wife was still a lawful resident, no petition need have been filed, and the Board would have been compelled to act on petitioner's motion. Since the wife has attained United States citizenship, the petitioner loses the right to have the Board act. Previously, the respondent relied upon Noel v. Chapman, 508 F.2d 103(2d Cir.1975), but this Honorable Court also held in that decision that the Service could deny extended voluntary departure to aliens married to lawful residents while granting the same benefit to those married to United States citizens.

V

The defendant's reliance on Immigration and Naturalization Service v. Bagamasdad, 531 F.2d 111(3rd Cir.1976; reversed - _____ U.S._____(45 U.S.L.W.3326), is misplaced. This case involved an application for adjustment of status to that of a permanent resident under Section 245 of the Act, 8 U.S.C. 1255. The immigration judge denied the application as a matter of discretion and did not decide whether the alien satisfied the specific statutory requirements of law. The Court of Appeals held that the immigration judge was required to make findings and conclusions with regard to the applicant's eligibility for residence. In reversing, the Court held that since the application would have been properly denied whether or

not the eligibility requirements were satisfied, there was no reason to require the judge to arrive at purely advisory findings as to eligibility. In the instant case, the Board never decided whether the petitioner merited the relief requested and failed to exercise its discretion.

Respectfully submitted,

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